

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 3266 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.PANDIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

LALITKUMAR DAMODARDAS BHOJAK

Versus

STATE OF GUJARAT

Appearance:

MR BHARGAV N BHATT for Petitioner
Mr. Y.F.Mehta A.P.P. for Respondent No. 1
MR MK OZA for Respondent No. 2

CORAM : MR.JUSTICE S.D.PANDIT

Date of decision: 04/10/96

ORAL JUDGEMENT

Rule.

Lalitkumar Damodardas Bhojak the accused in cri.
case no. 301/96 on the file of learned JMFC, Danta
district Banaskantha has filed the present application.
As the matter is heard on merits by giving sufficient
opportunity to both sides I proceed to decide it finally.

2. The said criminal case no. 301/96 is registered against the present petitioner on the strength of a private complaint lodged by the respondent no.2 Maheshbhai Lumbbhai Bubadia. After recording the statement of the complainant on oath the learned JMFC though it fit to direct the police to hold an inquiry under section 202 Cr.P.C. by his order dated 19.2.96. After the report of the inquiry u/s 202 Cr.P.C. was filed, learned JMFC issued process against the present petitioner for the offence punishable under sections 504,352,506(1) and 323 I.P.C.

3. The petitioner has come before the court to quash the said proceedings and his main contention is that there is no compliance of the mandatory provisions of section 204(2) Cr.P.C. He contended before me that the complainant has not filed the list of prosecution witnesses and consequently the learned Magistrate was not justified in issuing process against the present petitioner in view of the provisions of sub section 2 of section 204 Cr.P.C. In support of the said contention he has cited before me the 15 GLR 136 in the case of Dhanji Mavji & ors. vs. Gadhvi Govind Jiva & ors. and 18 GLR 299 in the case of A.P.Jain vs. C.N.Jotwani & ors. In both these cases, this Court has held that provisions of sub section 2 of section 204 are mandatory. I myself do not find any reason to take a different view. Therefore, I will proceed on the assumption that the provisions of sub section 2 of section 204 Cr.P.C. are mandatory.

4. In this complaint, while narrating the incident in question, the complainant has named his brother as well as his friend Kamleshbhai as the two witnesses to the incident and in para 4 of his complaint he has stated that he wants to examine those two witnesses and if necessary he would also examine other witnesses. That averment made in the complaint clearly shows that besides those two persons named in the complaint, the complainant intends to examine other witnesses also if he finds it necessary at the trial. Provision of sub-section 2 of section 204 Cr.P.C. is made in order to give opportunity to the accused to know what evidence will be led against him. In a case where State being complainant, the accused gets the benefit of not only the names of the witnesses to be examined against him. But also the statement of witnesses recorded u/s 161 Cr.P.C. This provision is made in order to facilitate the accused to defend himself and in view of giving him proper opportunity to defend him by the provisions of sub-section 2 of section 204 Cr.P.C. it has been made

compulsory to have on record the list of prosecution witnesses before issuing the process. In the instant case, the complainant has not annexed with the complaint a separate list of witnesses. No doubt the complaint mentioned in his complaint the names of two witnesses i.e. his brother and his friend Kamleshbhai. He goes on adding that he would also examine other witnesses if necessary. Therefore, in the circumstances, after receiving the report u/s 202 Cr.P.C. the learned Magistrate ought to have asked the complainant to make the position clear as to whether he did not want to examine any other witnesses besides the two witnesses named in body of the complaint and in case he wants to examine any other witnesses he should do so by filing a list of witnesses. Therefore, in the circumstances, there is no compliance of sub section 2 of section 204 Cr.P.C. in this case before issuing process against the accused in this case. Learned advocate for the petitioner wants to quash the whole proceedings but the criminal proceedings could be quashed only if the court finds that the prosecution is not at all justified and it is an abuse of process of law.

5. Learned advocate for respondent no.2 urged before me that the learned Magistrate has already issued process and this court should not exercise the powers for quashing the said order of issue of process. In support of the said contention he has cited before me the case of Dhanalaxmi vs. R.Prasannakumar & ors.AIR 1990(SC) 494. With due respect to the L.A for the respondent no2, it must be stated that said case is not at all helpful to him. In that case under inherent powers there was a question of quashing of the whole of the proceedings and when the whole of the proceedings are to be quashed under section 482 Cr.P.C. powers under section 482 Cr.P.C. are to be exercised by the court very carefully and they are to be exercised only in case of necessity and if it is a case of misuse of process of law if the powers under section 482 Cr.P.C are not used carefully then it will result into injustice as has been held in that case. Here what I have found is that before issuing the summons against the accused under section 204 Cr.P.C. there is no compliance of mandatory provisions of sub.section 2 of section 204 Cr.P.C. and only on that technical ground I am setting aside the order of issuing process passed by the learned Magistrate. When the learned Magistrate has passed the order of issuing process after receiving the report under section 202 Cr.P.C. and it is possible that on perusing the report under section 202 Cr.P.C. he did not find a fit case to be dismissed under section 203 Cr.P.C. Therefore, I hold that the order of issuing

process passed by the learned Magistrate without following the mandatory provisions of sub section 2 of section 204 Cr.P.C. will have to be quashed and set aside the matter will have to be remanded to the learned Magistrate to get the list of witnesses from the complainant before issuing summons against the present petitioner -accused.

6. Thus I hold that the present petition will have to be partly allowed. Order of issue of process passed by the learned Magistrate on 15.3.96 is set aside and the learned JMFC, Danta district Banakantha should ascertain from the complainant as to whether he wants to file any list of witnesses besides the witnesses mentioned in the body of the complaint and then to file list of witnesses and after filing the list of witnesses to pass the order of issue of process. The petitioner is entitled to raise whatever contentions he wants as regards discharging him at the time of framing of charge. Rule made absolute in the aforesaid terms.

(S.D.Pandit.J)